No. 507

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

RICHARD A. MACK AND THURMAN A. WHITESIDE,
Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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By way of reply to the brief of the United States in opposition to their petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit, the petitioners respectfully state to the Court as follows:

I.

After pointing out, quite correctly, that the instant petition raises the "precise issue" involved in *Gilmore* v. *United States*, 264 F. 2d 44 (C.A. 5 1959), cert. den. 359 U.S. 994 (1959), the Government contends that "there is no greater reason for further review here than in *Gilmore*." (Br. 4-5) Such a statement overlooks the fact that in that case, counsel for the defendant never cited, either in his brief to the Fifth Circuit or in his petition for certiorari, the case of *Stack* v. *Boyle*, 342 U.S. 1 (1951), which is the keystone of the argument in the present petition. Nor was the *Stack* case cited or discussed in the opinion of the Fifth Circuit.

This failure on the part of the Government to perceive the essential difference in theory between the petition in *Gilmore* and that in the present case has led it to misunderstand completely petitioners' position. Thus the Government states:

> "But the fact that a constitutional right is claimed does not make a non-final order final." (Br. 7)

This language appears word for word in the Government's Brief in Opposition filed in the *Gilmore* case. However appropriate the statement may have been in response to that petition, it utterly misses the point of the present one.

Petitioners do not contend that any time a trial court makes a ruling which, if erroneous, would constitute a denial of a constitutional right, that ruling is transmuted into a "final decision" and may be immediately appealed. They do not question the Govern-

ment's argument that "the fact that a constitutional right is claimed does not make a non-final order final." It is only when the constitutional right claimed is of such a nature that it "would not be subject to effective review as part of the final judgment in the action" that an appeal may be taken. *Parr* v. *United States*, 351 U.S. 513, 519 (1956). In *Stack* v. *Boyle*, 342 U.S. 1 (1951), this Court held that the erroneous denial of bail was a "final decision" because the constitutional right to bail by its very nature is substantially useless unless erroneous denial of it can immediately be reviewed by an appellate court. By the same token, petitioners now argue that their constitutional right to be free from the harassment of repeated trials is of such a nature that it must be given immediate review when it is erroneously denied. The concept of finality must never be used to emasculate a constitutional right. In *Stack* v. *Boyle*, *supra*, this Court rejected a reading of finality which would have eviscerated the constitutional right to bail. Petitioners now ask this Court to reject an interpretation of finality which strips the constitutional right to be free from repeated trials of much, if not all, of its meaning.

II.

In the Court of Appeals petitioners sought the opportunity to demonstrate that at the close of all the evidence in the first trial, they were entitled to stand acquitted on the ground that the prosecution had not adduced sufficient evidence to sustain a guilty verdict. The Government now concedes that if petitioners are correct in this claim, another trial would violate the double jeopardy provision of the Constitution. At the same time, however, the Government

takes the position that the doctrine of finality prevents any review of this claim prior to a conviction. (Br. 7 n. 5) It, therefore, now repudiates its contention, made below, that the error will never be reviewable.

Perhaps nothing so points up the suspect nature of this contention as a consideration of the alternative which the Government puts forward to present appellate review. Petitioners are told to follow this course: (1) plead double jeopardy at the start of the second trial; (2) if the trial judge overrules the plea, endure the strain and expense of a second trial; (3) if convicted, designate for appeal the first trial record as well as that of the second; and (4) demand that the appellate court review the sufficiency of the evidence at the first trial as a prelude to any consideration of the second trial.

This labyrinthine procedure is at once cumbersome and wasteful. It is cumbersome because in all cases where the first trial terminates in a hung jury, the judge who is to preside at the second trial must at the outset review all the evidence at the first trial so he can equip himself to pass knowledgeably on the double jeopardy plea. Moreover, in all cases where the plea is overruled, and a conviction follows, the appellate court must review the records of two, and perhaps more, trials. The Government's theory is wasteful because in those cases where an appellate court finds that the first-trial evidence was deficient, the second trial automatically becomes meaningless.

Perhaps the best way to illustrate that such a course of proceeding is nonsensical is to consider what it would call for in the context of the present case. The retrial has been assigned to a judge who until now

has had no contact with this case. According to the Government, when petitioners plead double jeopardy at the beginning of the second trial, this judge cannot enter upon the trial until he first studies the seven thousand pages of testimony and the hundred-odd documentary exhibits accumulated during the three-month first trial. Moreover, in the event petitioners' plea is overruled and a jury then returns a guilty verdict, the Court of Appeals for the District of Columbia Circuit faces the same monumental task before it can even proceed to a consideration of the second trial record.

In contrast to this weird procedure, one must concede the sense, the soundness, the practical advantage, of petitioners' position that the order is presently appealable. Since under this view the order denying judgment of acquittal would be final and appealable, a "failure to appeal therefrom forfeits [the] right of review." *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 516 (1950). Therefore, a defendant who does not appeal at once from such an order will waive the right to do so should he be convicted at a subsequent trial. Under the view of finality urged by petitioners, the ghosts of a past trial cannot haunt a later appeal. Nor would such subsequent trial ever be reduced to a study in futility and waste by a belated appellate decision that an acquittal should have been entered at the end of the first trial.

III.

The Government suggests at page 8 of its brief that the position of petitioners will lead to delay of a second trial. This argument comes very close to begging the question. The purpose of petitioners in seeking review

of the order denying their motion for judgment of acquittal is not to delay the second trial, but to prevent it altogether. It is true that if the appellate court rejects petitioners' contention that there was insufficient evidence to warrant a guilty verdict, a retrial will result. However, an appeal would not necessarily delay that second trial. It would be a simple matter for the lower appellate court to amend its rules to provide for an advanced hearing of those relatively few criminal trials ending in a hung jury. It is interesting to note that provision for summary hearing of appeals from denials of bail was provided for by appellate courts in the aftermath of this Court's decision in *Stack* v. *Boyle*, 342 U.S. 1 (1951). See, e.g., Rule 33(c) of the United States Court of Appeals for the District of Columbia Circuit.

IV.

Rule 29(b) gives the trial judge an option when the defendant makes a motion for judgment of acquittal at the conclusion of all the evidence. The court may decide the motion before the case is submitted to the jury, or he may reserve his decision on the motion. In the case at bar, the trial judge reserved decision on this motion. As a matter of fact, the trial judge had the motion under advisement for almost three weeks. This hesitancy on the part of the trial judge coupled with the deadlocking of the jury is a strong indication that there is some inherent deficiency in the Government's case. An order rendered under such

circumstances of doubt certainly should be deemed final enough for an appeal. This case then presents to the Court its first opportunity to delineate the relationship between the reservation of decision under Rule 29(b) and the concept of finality.

Respectfully submitted.

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